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AUTOKITA SDN BHD

v.

PUBLIC FINANCE BHD

B

HIGH COURT MALAYA, SHAH ALAM
ABU SAMAH NORDIN J
[CIVIL APPEAL NO: 11-18-1995]
20 OCTOBER 2000

C ***HIRE-PURCHASE:*** *Breach of agreement - Recovery of loan - Hirer defaulting on repayment - Whether financier can recover loan from dealer which sold car to hirer - Allegation by financier that it was wrongly induced into granting loan to hirer by dealer's representations - Whether proved - Whether financier acted on its own judgment - Total failure of* D *consideration and common mistake of fact - Whether there was a contractual relationship between financier and dealer*

The hirer purchased a second-hand Volvo 240GL from the defendant/dealer, which purchase was partly financed by the E plaintiff/bank under a hire purchase agreement. The loan sum of RM23,000 was paid directly by the bank to the dealer. Subsequently, the hirer defaulted on his repayment, and the bank also found out from the Road Transport Department that the registration numbers of the Volvo actually belonged to a Datsun F 120Y. The bank then sued the dealer for the recovery of the loan and the magistrate allowed the claim on the grounds that (i) there was a total failure of consideration on the part of the dealer as it had no title to the motorcar and (ii) the mistake of fact was attributable to the dealer's negligence. The dealer appealed.

G **Held (allowing the dealer's appeal):**

(1) The bank's cause of action was based on wrongful inducement or representation but it was unable to adduce any evidence to show that it was so induced into granting the loan to the H hirer based on the dealer's representations. The loan was approved based on the bank's own and independent judgment, and not solely on the information or documents provided by the dealer. The dealer had merely introduced the hirer to the bank. The bank could not rely upon its own mistake or I omission to blame the dealer. The *caveat emptor* principle would apply to the parties here. (para 11 & 15)

(2) The bank's contention that there was a common mistake of fact as well as its reliance on ss. 21, 66 and 73 of the Contracts Act 1950 were misconceived. There was no contractual relationship as between the bank and the dealer. The contract for the sale of the motorcar was between the dealer and the hirer. (para 1, 16, 17 & 21)

[Decision of magistrate overturned.]

Case(s) referred to:

Heng Long Motor Trading Co v. Osman Abdullah [1994] 3 CLJ 754 HC ***(refd)***

United Asian Bank Bhd v. Chun Chai Chai & Ors [1988] 2 CLJ 253; [1988] 2 CLJ 502 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 21, 66, 73

For the defendant/appellant/dealer - Cik Deborah; M/s Mah Weng Kwai & Assoc

For the plaintiff/respondent/bank - En Yeoh; M/s Azam-Malik & Soh

Reported by Gan Peng Chiang

JUDGMENT

Abu Samah Nordin J:

[1] This is an unfortunate case which should not have happened if only the respondent/plaintiff ('respondent') had exercised care and prudence in approving the car loan to the hirer under the Hire Purchase Agreement. On the facts of the case it appears to me that the respondent had itself to blame for its own omission.

[2] The facts of the case are simple enough. The hirer, Chen Chee Beng bought a second hand car, namely a Volvo 240 GL bearing registration no. CG 6363 from the appellant, a car dealer. The car has a certain engine and chassis numbers. As he could not pay for the full purchase price, the appellant introduced him to the respondent who agreed to part finance the purchase of the said car. The respondent granted the hirer a loan of RM23,000 under the Hire Purchase Agreement but paid the said sum direct to the appellant on behalf of the hirer. The hirer defaulted. A subsequent search by the respondent with the Road Transport

A Department showed that the registration number of the car belonged to a Datsun 120Y with different engine and chassis numbers.

[3] The respondent then sued the appellant for the recovery of
B the said loan. The learned magistrate allowed the respondant's claim with costs on that grounds that there was a total failure of consideration and that the mistake of fact was due to the appellant's negligence. Hence this appeal by the appellant.

C **[4]** In its statement of claim against the appellant the respondent alleged that it was induced to finance the hire purchase of the said car based on the appellant's used vehicle invoice No. 0160 dated 24.4.1986.

[5] Alternatively, it was alleged that the appellant had
D represented to the respondent that the particulars of the said car as in invoice No. 0160 were correct and that the appellant had good title to the car, which the respondent did believe and acted upon by approving the loan and entering into the hire purchase agreement with the hirer.

E

[6] The respondent further alleged that there was a total failure of consideration as the appellant had no title or right to the said car and that the sum of RM23,000 paid to the appellant was made under a mistake of fact.

F

[7] The appellant denied the allegations as pleaded by the respondent. In its defence, it averred that it merely introduced the hirer to the respondent and that the latter had approved the loan to the hirer based on its own judgment after making a physical
G inspection of the car and found that the registration number, the engine and chassis numbers tallied with the particulars as in the registration card (exh. P2). The appellant had earlier bought the said car on a trade in basis from another party, namely, Naturate Sdn. Bhd. The particulars in the invoice given to the respondent
H were based on the particulars in the registration card which it obtained from Naturate Sdn. Bhd. and believed it to be true.

[8] In this appeal the learned counsel for the appellant pointed out that the respondent's cause of action was based on inducement or representation but it had failed to adduce evidence
I of inducement or representation by the appellant. Neither did the learned magistrate make any finding in respect of inducement or representation.

[9] The respondent had through its own branch manager (SP1) testified that it was the respondent's standard practice to approve the loan based on the physical inspection of the car and upon being satisfied that the registration, the engine and the chassis numbers of the car tallied with those in the registration card. It was not a standard practice to make a prior search with the Road Transport Department. He confirmed that the loan was approved after the respondent's solicitor had inspected the car and found that the registration number, the engine and chassis numbers tallied with those in the registration card and invoice no. 0160. The respondent's solicitor had also interviewed the hirer.

[10] It was further submitted that there was no mistake of fact. The loan was approved based on the respondent's own and independent judgment. The appellant merely introduced the hirer to the respondent and showed the car together with the registration card and invoice. The respondent bears the risk if it approved the loan based on its own judgment without making a prior search with the Road Transport Department. It could not rely on its own mistake and blame the appellant. The maxim caveat emptor applies to the respondent. This maxim is explained in *Words and Phrases Legally Defined*, Vol. 1 as follows:

> The general rule is that each party to a contract may observe silence even in regard to facts which he believes would be operative upon the mind of the other. This is the rule which in contracts for the sale of goods is summed up in the maxim "caveat emptor". The seller is under no duty to disclose defects; the buyer must use his own eyes to discover them. The same rule applies to contracts generally (though other terms may be implied). The rule, however, does not justify misrepresentation (*Sutton and Shannon on Contracts* (6th Edn.) 141).
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> 'Caveat emptor' does not mean in law or Latin that the buyer must take a chance, it means that he must take care. It applies to the purchase of specific things, eg, to a horse or a picture upon which the buyer can and usually does exercise his own judgment. It applies also whenever the buyer voluntarily chooses what he buys. It applies also whenever by usage or otherwise it is a term of the contract express or implied that the buyer shall not rely on the skill or judgment of the seller. *Walls Russell* [1902] 2 LR 585, CA, per Fitz Abbon LJ at p. 615.

[11] In my view the maxim is equally applicable to the respondent, although it was not the buyer.

[12] It was further submitted that the learned magistrate erred in holding that there was a mistake of fact due to the appellant's negligence when it was never pleaded by the respondent.

[13] The learned counsel for the respondent submitted that the appellant had represented the particulars in the registration card as correct when in fact they were not and this had induced the respondent to approve the loan to the hirer. The respondent paid the sum of RM23,000 under a mistake of fact believing that the registration no. CG 6363 belonged to a Volvo 240 GL car when in fact it was that of a Datsun 120Y.

[14] Alternatively, it was submitted that it was more appropriate to decide the case on the respondent's alternative cause of action, namely, failure of consideration and mistake of fact. He relied on ss. 21, 66 and 73 of the Contracts Act 1950 and cited *United Asian Bank Bhd. v. Chun Chai Chai & Ors* [1988] 2 CLJ 253; [1988] 2 CLJ (Rep) 502 and *Rowland v. Divall* [1923] All ER 270.

[15] Upon scrutiny of the appeal records and after hearing the parties I am of the considered view that the respondent had failed to show that it was induced to approve the loan to the hirer based on the representation by the appellant. It was true that the appellant presented the car with its registration card and the invoice no. 0160 to the respondent but the respondent's decision to approve the loan to the hirer was not based on the documentary information provided by the appellant alone. The respondent merely used the registration card for the purpose of physical inspection of the car to verify whether the registration number, the engine and chassis numbers of the car tallied with those in the registration card. There was no evidence of representation whatsoever orally or by conduct, by the appellant that the particulars in the registration card and the invoice were correct. The respondent made the decision to approve the loan based on its own independent judgment upon being satisfied after physical inspection of the car by its own solicitor.

[16] The contention that there was a common mistake of fact and the reliance on ss. 21, 66 and 73 of the Contracts Act were based on the misconceived view that there was a contractual relationship between the respondent and the appellant. On the facts of this case the contract for the sale of the car was between

the appellant and the hirer. That being so, there could not be a total failure of consideration without there being any claim of prior contractual relationship between the respondent and the appellant.

[17] The contract for the purchase of the car was between the hirer and the appellant This was not a case where the respondent bought the car and paid the full purchase price to the appellant and thereafter entered into a hire purchase agreement with the hirer.

[18] In *Heng Long Motor Trading Co. v. Osman bin Abdullah* [1994] 3 CLJ 754 the respondent bought a van from the appellant, a car dealer. He paid a deposit of RM5,500 and entered into a hire purchase agreement with Affin Credit (M) Sdn. Bhd. to finance the balance of the purchase price of RM8,000. The hirer had paid the loan in full. The van was later seized by the Customs and Excise Department. The hirer and the finance company brought an action against the appellant for alleged breach of implied condition of the dealer's right to sell and to give sole possession and exclusive use of the van. The learned magistrate allowed the hirer's claim for damages against the car dealer. The dealer appealed.

[19] The issue before the High Court was whether there was a sale of the van by the dealer to the hirer prior to the entry of the hire purchase agreement. Chong Siew Fai J (as he then was) in dismissing the appeal held that there was a sale of the van by the dealer to the hirer prior to the hire purchase agreement. It was not a case where the finance company bought the van and paid the full purchase price to the dealer and thereafter let it to the hirer on a hire purchase.

[20] The case of *Rowland v. Divall* does not favour the respondent. In that case there was a contractual relationship between the plaintiff and the defendant. The plaintiff bought the car from the defendant and later discovered that the latter had no title to it. The plaintiff was compelled to surrender the car to the true owner and then successfully sued the defendant for recovery of the purchase money on the ground of a total failure of consideration. In our case there was no contract of sale of the Volvo car between the appellant and the respondent.

[21] The respondent's mistake in this case was self induced and not caused by the appellant's representation. As a financial institution, financing is its very business. In this case it even employed a solicitor. It could have been avoided if only it had exercised care and prudence by making a simple and inexpensive search at the Road Transport Department. On the evidence adduced the learned magistrate was clearly wrong when he held that there was a total failure of consideration and that the mistake of fact was caused by the appellant's negligence. Negligence was neither pleaded by the respondent nor proved in this case. In the result, I allowed the appellant's appeal with costs.